

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Accusation
Against:**

MUHANNAD S. HAFI, M.D.

**Physician's and Surgeon's
Certificate No. A 127064**

Respondent

Case No. 800-2015-011200

OAH No. 2018010054

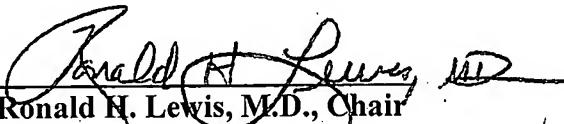
DECISION AND ORDER

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on December 21, 2018.

IT IS SO ORDERED November 21, 2018.

MEDICAL BOARD OF CALIFORNIA

By: 
Ronald H. Lewis, M.D., Chair
Panel A

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PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on September 24 through 27, 2018, in Oakland, California.

Deputy Attorney General Joshua M. Templet represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California, Department of Consumer Affairs.

John Fleeer, Attorney at Law, represented respondent Muhannad S. Hafi, M.D., who was present throughout the administrative hearing.

The matter was submitted for decision on September 27, 2018.

FACTUAL FINDINGS

Introduction

1. On August 23, 2013, the Medical Board of California (Board) issued Physician's and Surgeon's Certificate No. A127064 to Muhannad S. Hafi, M.D. (respondent). The certificate was in full force and effect at all times relevant here.

2. Complainant Kimberly Kirchmeyer is the Executive Director of the Board. She filed an accusation against respondent in her official capacity on November 21, 2017.

3. The accusation alleges that respondent committed misconduct during his examinations of Patient 1¹ on April 19, 2014, and of Patient 2 on August 18, 2016. Complainant alleges that on each occasion respondent violated Business and Professions Code sections 2234, subdivision (b) (gross negligence), 726 (sexual misconduct) and 729 (sexual exploitation).

4. The following factual findings were established by clear and convincing evidence and were based in primarily on the credible, compelling and persuasive testimony of Patient 1 and Patient 2. The testimony of Patient 1 was largely consistent with previous statements and testimony; it was detailed and in accord with documentary evidence, including police reports, and the testimony of her mother. The testimony of Patient 2 was likewise detailed and consistent with prior statements, and consistent with observations made by the staff at the clinic where respondent was employed.

Respondent's Treatment of Patient 1

5. In October 2011, Patient 1 underwent laparoscopic gastric banding surgery to help with weight loss. A lap-band adjustable gastric banding system was implanted to restrict food intake by allowing the effective size of her stomach to be adjusted. The lap-band requires regular physician visits, approximately monthly, for adjustments to ensure the proper quantity of food intake.

6. Beginning in September 2013, respondent was employed as one of several physicians at Independent Medical Services, East Bay Surgery Clinic (Independent Medical Services) in Fremont, California, where Patient 1 had her lap-band adjusted each month. Patient 1 had a history of depression and was taking medications to treat depression during the time she was treated at Independent Medical Services; this information was documented in her chart.

7. Respondent first saw Patient 1 on February 22, 2014, for a lap-band adjustment. The visit was unremarkable. Patient 1 also saw Stephanie Roberts, M.D., on that date; Dr. Roberts referred Patient 1 for a plastic surgery evaluation because of surplus skin resulting from her weight loss. Patient 1 was interested in removing the excess skin on her arms, inner thighs and stomach. She had no interest in breast augmentation surgery. Dr. Roberts did not examine Patient 1 for plastic surgery before making the referral. Patient 1 was placed on a list of patients interested in being evaluated for plastic surgery by a physician who was employed by Independent Medical Services, but located in Los Angeles. Once enough clinic patients had expressed an interest in plastic surgery, the surgeon would travel to Fremont to consult with the patients and perform the surgeries at a different facility.

8. Respondent saw Patient 1 for a second time on March 22, 2014, for another lap-band adjustment. Patient 1 also saw Dr. Roberts on March 22; they again discussed

¹ Patient names are being withheld to protect their privacy.

Patient 1's interest in a referral for plastic surgery to remove excess skin. Once again, Dr. Roberts did not perform a physical examination prior to making the referral.

9. On Saturday, April 19, 2014, Patient 1 saw Dr. Roberts. She was given a vitamin B12 injection and her weight loss medication (phentermine) was refilled. There is no documentation regarding a discussion of plastic surgery on that date. Patient 1 next saw respondent for a lap-band adjustment. There was no one in the room with Patient 1 and respondent. A medical assistant was often in the room with the physician during an adjustment. Patient 1 was seated on a reclining examination chair. Patient 1 noticed that unlike on previous visits, the red ring on the black surveillance camera in the corner of the room was not illuminated.

10. Respondent entered the room, greeted her and sat on a stool in front of her. Respondent asked what Patient 1 did for a living, and she told him she was a massage therapist. Respondent replied that he was "new to the area and could use a massage." Patient 1 gave him her business card.

11. Patient 1 recalled respondent from previous visits, thought he was nice, trusted him and may have been attracted to him. Respondent asked Patient 1 if she was interested in plastic surgery; she stated that she was interested in removing excess skin on her arms, thighs and stomach. Respondent asked to look at her legs; she lifted her skirt to the top of her thighs and respondent stated that she had "nice legs." Respondent did not comment on the suitability of plastic surgery on her legs.

12. Next, respondent touched her breasts while Patient 1 had her shirt on, cupping and lifting them. Patient 1 was surprised; this had never happened at an appointment before. Patient 1 was confused; she had no interest, and had never expressed an interest, in plastic surgery involving her breasts. She wondered if respondent was performing a breast examination. Respondent then stood and asked Patient 1 to lift up her shirt and she followed his instructions. She unhooked her bra for what she assumed must be a breast examination. Respondent touched Patient 1's breasts under her bra, in a lifting, cupping motion, moving her bra up to expose her breasts fully. Respondent adjusted Patient 1's examination chair to a fully reclined position and while standing over her as he continued to touch her breasts, squeezing them toward each other. Patient 1 was trying to make sense of what was happening. Respondent asked whether Patient 1 had someone "to do this for her" and she replied that she did not. He said "someone needs to take care of you." Patient 1 did not understand what was happening. Respondent said nothing about a cancer screening or a breast examination.

13. Respondent then leaned down and gave Patient 1 two "pecks" on the lips, the type of kisses a grandmother would give. Patient 1 froze; she was so confused. She thought perhaps respondent was attracted to her and she was not sure what to think. Without mentioning an oral examination, respondent put his ungloved finger in her mouth and rubbed it around. Respondent then began to rub his genitals over his pants. Patient 1 was fully reclined, her breasts were fully exposed and her arms were at her sides. Respondent then grabbed Patient 1's left hand and rubbed her hand back and forth over his pants and she could feel that

his penis was erect. Patient 1 was scared. It went on for one or two minutes, then respondent removed his hand; Patient 1 continued rubbing respondent's pants for a minute or two. Patient 1's eyes were closed; she opened them and looked at the camera hoping it was recording.

14. Respondent asked her if she was okay, then put on gloves and adjusted her lap-band, which took five to 10 minutes. Patient 1 hooked her bra. Before he left, respondent stated, "Well, this was nice." The appointment had lasted 30 minutes, twice as long as usual. After the appointment, Patient 1 did not say anything to respondent's staff. She made her next appointment and left. Patient 1 was scared and confused and did not want a confrontation; she wanted everything to be normal.

15. Driving home, Patient 1 realized that what had occurred was wrong. When she got home, she called her mother and her best friend to discuss what had happened, but was unable to reach them. The next day was Easter Sunday and Patient 1 saw her mother. She told her mother what had occurred. Patient 1 had fallen apart emotionally; she felt violated and confused. Her mother spent a couple of nights sleeping at her daughter's home to comfort her.

16. Patient 1's mother encouraged Patient 1 to contact the police, but she was reluctant to do so initially. She was afraid of the repercussions, afraid of testifying and worried about her safety realizing that respondent had all of her personal contact information. Patient 1 did not want to see respondent again and she was afraid she would not be believed.

17. Patient 1's mother asked her to document what had occurred by writing down notes of her recollection that she could give to the police, which she did. Ultimately, Patient 1 did not want what had occurred to happen to others, so she decided to report the misconduct.

Police Investigation and Criminal Proceedings

18. Patient 1 and her mother contacted the police department in her home town on Monday, August 21, but they were referred to the Fremont Police Department, where respondent's office was located. They were instructed to come to the Fremont Police Department on Tuesday, April 22, 2014. Patient 1 and her mother were interviewed by police officers and Patient 1 provided them with her notes. Patient 1 asked the officer to check to see if the video camera in the room had been on and had recorded the incident; she later learned it had not been activated that day.

19. Patient 1's next appointment at Independent Medical Services was scheduled for May 3, 2014. That morning, Patient 1 made two pretext calls to respondent at the direction of the investigating officers. When Patient 1 asked respondent if he had had fun during the last visit, respondent did not respond. When Patient 1 asked if she could have the same exam as last time, respondent did not respond. When Patient 1 stated that she could not wait for him to touch her again, respondent was quiet, then said, "I'm sorry." Patient 1 reiterated that she could not wait for him to touch her; respondent was quiet then stated that he would be happy to help her with her lap-band.

When Patient 1 asked if he was going to kiss her again, respondent replied, "I'm not sure I can . . . help. Excuse me." Patient 1 asked again if respondent was going to kiss her again. Respondent was quiet for a few seconds; he then replied that he was unsure about Patient 1's questions, but she was welcome to come into the office. Patient 1 asked if there was anything special he wanted her to wear to the visit, respondent thanked her for calling and said he had to go, then hung up.

During a second call on the same day, Patient 1 said she was 10 minutes away and asked if everything was okay; respondent said that everything was fine. She asked respondent if he was mad at her; respondent replied, "I don't think there's anything that . . . beyond . . . I mean don't what's what you're talking about. I'm just saying that as far as your symptoms." Patient 1 asked "What do you mean?" Respondent replied, "I'm sorry I can't." She asked if he was unable to speak because someone was listening and he stated, "Umm again, I'm sorry. I'm not sure what you're talking. Again if there's something we can help you out with here in the clinic we'll be happy to."

Patient 1 asked "What do you mean you don't know what I'm talking about. Do you know who I am? Have you forgotten me already?" Respondent said, "I'm sorry" and said he wasn't sure what they were talking about. Patient 1 confronted respondent about saying that she had nice legs, and said she thought respondent liked her. Respondent ignored her statements and said he was able to adjust her lap-band to address her symptoms. Patient 1 asked if he remembered kissing her; respondent said: "I'm not sure. . . I'm not sure what you're referring to. But again, I . . . I . . . please don't call back. I have patients to see. Okay" and he hung up. Respondent did not mention the call to anyone or document it in the chart.

20: On the afternoon of May 3, 2014, police officers arrived at Independent Medical Services. The office manager told the officers that the surveillance cameras are not regularly used and there was no recording of Patient 1's visit. The manager also stated that most patients seen for lap-band adjustments do not remove their clothing; patients are usually asked only to lift their shirts above the waist to allow physicians to examine the stomach area. The manager also stated that if a male physician is examining a female patient, a female medical assistant usually accompanies the doctor during the examination; however, she recalled that it was not uncommon for respondent to tell the medical assistants that he would conduct an examination on his own.

21. The officers asked respondent to come to the police department to be interviewed and he agreed. When the officers asked respondent about Patient 1, he at first acted like he did not recall her and said he had a lot of patients with that first name. He did not mention having spoken to her on the telephone a few hours earlier. After officers further described Patient 1, respondent recalled her.

Respondent admitted having Patient 1 remove her shirt and bra during her appointment. He told the officers that he had done so because Patient 1 had expressed an interest in breast enhancement surgery. He stated that he conducted a breast examination for lesions, fat

distribution and to assess her for a plastic surgery referral. Respondent claimed that touching Patient 1's breasts was normal procedure.

When asked if he gave two quick kisses to Patient 1, respondent did not deny kissing Patient 1; instead, he said that everything he does is for professional reasons. He added that if the patient perceives something different, that is on them, but he is always professional. Respondent said he could not remember an incident like that (kissing her on the mouth), then said "maybe but I can't recall." Respondent stated that he checked Patient 1's eyes, nose and mouth for lesions. Respondent said that physicians do not always perform this type of examination, but if a patient requests it, he will do it.

When asked, he admitted his fingers were ungloved when he examined Patient 1's mouth for lesions. He said that the lighting in the room was not good and he did not have a flashlight so he used his fingers to probe her mouth.

When asked if Patient 1 was "forward" with him, he said he could not remember. He admitted that she might have touched him. When asked if Patient 1 touched his penis, respondent was quiet, then said he was "not sure," and "I don't know if she tried" and "I can't remember." He said Patient 1 could have accidentally touched his penis because he was standing close to her.

The officers described Patient 1's account of the office visit. Respondent did not deny Patient 1's description of the examination. When asked if it was possible Patient 1's account was the way it happened, respondent stated "it is possible." When asked if Patient 1 was rubbing his penis, respondent said "I am not sure, I don't think so."

Respondent acknowledged that no one else was in the room during his examination of Patient 1. He stated that he did not document his full examination of Patient 1, and that it was common practice to only document findings if there was something wrong.

Respondent was evasive during the interview. The officers commented that respondent looked nervous, at which point he asked if the interview was being recorded; they confirmed that it was. Respondent stated that he could not remember the examination because it had occurred two weeks earlier. The officers asked if he had spoken with Patient 1 and he acknowledged that she had called him earlier in the day. Respondent said that Patient 1 had brought up her feelings toward him, but said he did not answer her questions. The officers noted that he did not deny kissing her during the telephone call and he agreed. Respondent stated that he wanted to end the interview and complained that the officers should have advised him to obtain an attorney before being interviewed.

22. The officers reviewed respondent's medical documentation of his examination of Patient 1 on April 19, 2014. The medical record did not document a breast examination or an oral examination. There was no documentation of Patient 1 requesting to be examined for plastic surgery, of his findings, or of a referral.

23. Respondent was terminated from Independent Medical Services on May 3, 2014, as a result of Patient 1's allegations.

24. Respondent was arrested and charged with violating Business and Professions Code section 729 (sexual exploitation by a physician). A jury acquitted respondent of the charge on April 6, 2016.

Respondent's Treatment of Patient 2

25. Patient 2 was a candidate for a position as a caregiver; she was offered the position, but needed to pass a physical examination in order to be hired. Patient 2 needed the job to support herself.

26. On August 18, 2016, four months after respondent's acquittal, Patient 2 arrived at Concentra Urgent Care and Occupational Medicine (Concentra) in San Leandro for her pre-employment physical evaluation. Respondent was assigned to perform the examination.

27. After he entered the examination room, respondent looked at her strangely and said that she "looked good." Patient 2 assumed he meant that she looked healthy. No one else was in the room; she was not offered a chaperone. Patient 2 was sitting in the middle of an examination table with her legs bent down over the table at the knees. She was wearing a summer dress and paper shorts that had been given to her at the clinic. The examination table was placed against a wall.

28. Respondent approached Patient 2 and stood very close to her with his stethoscope, placing it on her breasts. He then moved closer and pressed his erect penis against her knees. Patient 2 was alarmed; she pushed his chest, pushing him away from her body, and said "Go back!" Patient 2 could see his erection under his pants and was sure it was not an accident. Respondent did not say anything in response. Patient 2 was angry and frustrated; she wanted to yell; she could not understand why a physician would violate her that way. She did not leave because she needed to pass the examination in order to get the job.

29. Respondent approached Patient 2 again and asked her to open her mouth. He used a wooden stick to look in her mouth, then placed the stethoscope on her back. Patient 2 was afraid that he would touch her again, so she held her legs together very tightly and moved them to the side. Once again, respondent pressed his penis against her, this time, against her thigh/hip area. Patient 2 wanted to yell or to cry, but she just waited for the examination to be over. It lasted approximately 10 minutes.

30. As soon as respondent left the room, Patient 2 exited and went to the reception desk to report what had occurred. Patient 2 was yelling and crying, saying that she wanted to file a complaint; she wanted everyone to know what had happened to her. The staff took Patient 2 into a private room. She was crying. Patient 2 told the staff what had occurred. The staff members left her in the room alone. Shortly thereafter, there was a knock on the door. Respondent looked into the room and saw her crying; he said "I'm sorry," then closed the door.

and left. The staff escorted Patient 2 to the exit and instructed her to contact Human Resources to file her complaint. Patient 2 sat in her car and cried. She called her daughter-in-law, then drove to her daughter-in-law's home. Her daughter-in-law recommended that she contact the police. Patient 2 agreed; she did not want anyone else to experience what she had.

31. Patient 2 contacted the San Leandro Police Department and an officer came to her daughter-in-law's home to take a report the same day. The officer noted that Patient 2 was visibly upset and scared during the report, and multiple times the officer had to wait for her to stop crying before she could continue. Patient 2 became extremely upset when she was shown a line up with respondent's photo. She identified him without hesitation.

32. On August 29, 2016, officers arrived at Concentra. They located respondent in the parking lot and arrested him. Respondent refused to answer any questions. The officers entered the clinic and spoke to staff. The staff members recalled the incident. One staff member reported that she had seen respondent leave the hallway where he was completing paperwork after the appointment and go to the room where Patient 2 was sitting alone. She thought it was strange for him to enter that room since it was not an examination room. Patient 2 later reported to her that he had said "I'm sorry" when he opened the door. The staff member did not know if he was sorry for having entered the room or if he was apologizing for his actions.

33. Respondent was terminated by Concentra on September 21, 2016.

34. Criminal charges were not filed against respondent based on Patient 2's allegations.

35. Following this incident, Patient 2 had trouble sleeping, had nightmares and continued to perseverate over what had occurred. Patient 2 has been seeing a psychologist to help her deal with her feelings. She feels distrustful toward physicians after this experience.

36. Patient 2 filed a civil suit against respondent. The case is pending. There has been some media coverage concerning the lawsuit and Patient 2's interview was broadcast on television.

Medical Board Interview

37. On April 18, 2017, respondent attended a Board interview with his counsel. In contrast to his police interview, respondent did not hesitate in answering questions concerning his examination of Patient 1. When asked whether Patient 1 had touched his penis on April 19, 2014, respondent stated: "Absolutely not." When he was asked if he gave Patient 1 two pecks on the mouth, respondent repeated, "Absolutely not."

38. Respondent stated that he had touched Patient 1's breasts because she requested a breast examination. Respondent stated that he did not have a chaperone in the room because

he did not know Patient 1 wanted a breast examination beforehand. Respondent denied having put his fingers in Patient 1's mouth, but admitted that he performed an examination of her mouth to check for growths.

39. Respondent admitted that he did not document his breast or mouth examinations. He said he did not have the correct template for a pre-operative examination.

40. Respondent stated that he had not been truthful with the police when he said that Patient 1's allegations were possibly true and that he could not recall. Respondent claimed that he was trying to protect Patient 1 by stating that he did not recall what had occurred. He felt it would violate HIPAA² if he said she had lied to the police because it would indicate Patient 1 was suffering from a psychiatric condition.

41. Respondent denied any familiarity with the substance of Patient 2's allegations. He refused to answer any questions about that examination, asserting his right to remain silent.

Expert Opinions of Dr. Cohen

42. Michael Cohen, M.D., testified as an expert witness on behalf of complainant. Dr. Cohen graduated from University of California, Irvine, School of Medicine in 1983. He completed a three-year residency in general surgery at the University of Southern California Medical Center from 1983 to 1986. Dr. Cohen completed a three-year residency in occupational medicine, aerospace medicine and preventative medicine at the United States Air Force School of Aerospace Medicine in San Antonio, Texas, from 1992 to 1995. He is board certified in occupational medicine and aerospace medicine.

Dr. Cohen has had an occupational medicine practice since 1995. He has been the Chief of the Department of Occupational Medicine and Associate Medical Director of Sutter Medical Group since 2006; he supervises medical providers at nine occupational health clinics and practices clinical occupational medicine in Auburn and Roseville, California. Dr. Cohen spends 90 percent of his time on patient care. Dr. Cohen has reviewed five cases for the Board over the past six years. The testimony of Dr. Cohen was uncontradicted and persuasive.

DR. COHEN'S OPINIONS CONCERNING PATIENT 1'S EXAMINATION

43. The Board asked Dr. Cohen to review respondent's treatment of Patient 1. He reviewed police reports, Patient 1's medical records from Independent Medical Services, the transcript of respondent's police interview, the transcripts of the police interviews of Patient 1 and her mother, the transcript of respondent's Board interview and respondent's curriculum vitae. Dr. Cohen also listened to the pretext calls between Patient 1 and respondent, and the digital files of police interviews of Patient 1, her mother and respondent.

² Health Insurance Portability and Accountability Act (42 U.S.C. § 1320d).

44. Dr. Cohen noted that a breast examination is not normally performed during an appointment for a lap-band adjustment. If the need for a breast examination arises, the proper procedure would be for the physician to give the patient a gown to change into, to offer a chaperone, and to leave the room while the patient changes into the gown. If a patient refuses a chaperone, it is prudent to note that a chaperone was offered in the chart. It is inappropriate to ask the patient to lift her shirt and push up her bra to perform the examination. It is also inappropriate to push the patient's breasts together during the examination. If a breast examination is performed, the physician must document that in the chart, including any findings. Dr. Cohen noted that neither a breast examination nor a plastic surgery screening was noted in Patient 1's chart. The failure to document a breast examination is a simple departure from the standard of care. Fondling a patient's breasts constitutes an extreme departure from the standard of care, sexual misconduct and sexual exploitation.

45. Kissing a patient on the mouth is outside of the scope of the physician-patient relationship and constitutes an extreme departure from the standard of care, sexual misconduct and sexual exploitation.

46. Examining a patient's mouth for lesions is outside the scope of a lap-band adjustment appointment. If an examination of the patient's mouth is indicated, the physician should wear gloves and use a flashlight to illuminate the area. There was no indication in the record that a mouth examination was indicated. After performing the examination, it must be documented in the chart. Placing an ungloved finger in a patient's mouth constitutes a simple departure from the standard of care. Failing to document the examination constitutes a simple departure from the standard of care.

47. A physician's act of rubbing his erect penis while using an ungloved finger to rub the patient's tongue is outside of the scope of an examination and constitutes an extreme departure from the standard of care, sexual misconduct and sexual exploitation.

Placing a patient's hand on a physician's clothed erect penis constitutes an extreme departure from the standard of care, sexual misconduct and sexual exploitation. Whether the patient objects is irrelevant.

48. Dr. Cohen noted that Patient 1 had been treated for depression and was taking anti-depressant and anti-anxiety medications. Moreover, Patient 1 was relying on the clinic to adjust her lap-band on a monthly basis. He considered Patient 1 to be a vulnerable individual, especially in a physician-patient relationship because physicians hold the power in this relationship.

DR. COHEN'S OPINIONS CONCERNING PATIENT 2'S EXAMINATION

49. Dr. Cohen reviewed the San Leandro Police Department report of its investigation into Patient 2's complaint. He reviewed respondent's Board interview transcript pertaining to Patient 2's allegations. Dr. Cohen reviewed the transcripts of police interviews

of respondent, staff at Concentra, and he reviewed the digital copy of respondent's Board interview.

50. Dr. Cohen opined that a physician pressing his erect penis against a patient during a pre-employment examination constitutes an extreme departure from the standard of care, sexual misconduct and sexual exploitation. Because it happened twice, it was not an accident or an inadvertent touching. Patient 2 was vulnerable because she was depending on his report to approval for work.

DR. COHEN'S CONCLUSIONS

51. The American Medical Association Code of Ethics requires that the interests of the patient be placed above the interests of the physician. Physicians are aware that sexual contact with a patient is unethical, which is based on the Hippocratic Oath to never harm a patient. Fondling a patient's breasts, kissing a patient, rubbing a patient's tongue and rubbing a penis against a patient during an examination each violate the Code of Ethics. These actions violate the boundary between a patient and a physician and violate the public's trust in physicians in general.

52. Dr. Cohen opined that respondent's conduct toward Patient 1 and Patient 2 constituted extreme departures from the standard of care, sexual misconduct and sexual exploitation.

Respondent's Training and Employment History

53. Respondent is originally from Syria. He graduated from Damascus University, Faculty of Medicine, in 2002.

54. Respondent earned a Master of Public Health degree from George Washington University in 2004. From October 2003 to May 2004, respondent was a research associate at George Washington University Department of Epidemiology and Biostatistics; he was elevated to the position of research scientist/epidemiologist in October 2004. From May 2005 to August 2006, respondent was a clinical research coordinator/sub-investigator in the Department of Surgery at Georgetown University Hospital. He earned a certificate in Senior Executive Leadership from the Georgetown University Center for Professional Development in December 2006.

55. Respondent was a post-doctoral fellow in cancer epidemiology at the United States Military Cancer Institute at Walter Reed Army Medical Center from March to September 2007; he then worked as a data management research associate at MedStar Research Institution from September 2007 until June 2008.

56. Respondent was certified as ready to enter postgraduate education by the Educational Commission for Foreign Medical Graduates on January 31, 2008. Respondent

was a general surgery resident at the University of Maryland affiliate, Union Memorial Hospital, from July 2008 to July 2010. He did not complete the program.

57. From 2010 to 2013, respondent spent time in Syria.

58. Respondent attended a nuclear medicine residency in the Stanford University Hospital and Clinics Department of Radiology from July 2013 to July 2014. Respondent did not complete residency training and is not board certified.

59. Between September 2013 and April 2014, respondent was employed on Saturdays as a surgeon assistant in bariatric surgery at Independent Medical Services. Respondent did not work a full shift; he would see 10 to 15 patients on a Saturday shift. It was in this position that he treated Patient 1.

60. From July 2014 to March 2015, respondent worked as a medical information director at MedExpert International, Inc., in Redwood City. From April 2015 until September 2015, he was employed as a rehabilitation physician at Coastside Medical Clinic in Daly City. He worked at an Occupational Medicine Physician at Alliance Occupational Medicine in Santa Clara performing fitness for duty evaluations from June 2015 to August 2016.

61. Between April 2016 and September 21, 2016, respondent performed fitness for duty evaluations at Concentra in San Leandro. Patient 2 saw respondent at this facility.

62. From January 2017 through the present, respondent has been employed at NMCI Medical Clinic in San Jose, managing acute, subacute, and chronic workers' compensation injuries.

Respondent's Testimony

63. Respondent is married and has one daughter. He would like to continue his medical education in occupational medicine.

64. Respondent recalls his examination of Patient 1 on April 19, 2014. There were chaperones available, but he did not feel one was necessary and did not offer one to her. Signs on the wall offered chaperones at the patient's request. Patient 1 is the only patient that respondent evaluated for plastic surgery while he worked at Independent Medical Services. Respondent noted that checking the breasts for lesions was not part of the screening; he stated that he checked Patient 1's breasts for lesions as a courtesy to her. Respondent testified that he clearly recalls that Patient 1 wanted breast augmentation surgery and asked for a breast examination to determine her eligibility; he claims that Patient 1's primary concern was having larger breasts. Respondent's testimony on this point was not credible.

Respondent recalls his April 19, 2014 examination of Patient 1. Respondent testified that he described the breast examination procedure to Patient 1, stating that there were two steps: looking at her breasts then palpating them. He did not ask her to put on a gown before

examining her breasts. Respondent testified that he did not recall if Patient 1 pulled her shirt above her bra, but he recalls that she unhooked her bra. Respondent is not sure if her bra was pushed up above her breasts, but believes her shirt was still on. He does recall asking her if she had someone to check her breasts at home and counseling her to examine her breasts herself or have them examined by a physician regularly. Respondent denies fondling or touching Patient 1's breasts unnecessarily.

65. Respondent denies kissing Patient 1 or putting his fingers in her mouth. Respondent states that he only touched Patient 1's chin to tilt it back so that he could look inside of her mouth for lesions. He did not have a flashlight and did not wear gloves. Patient 1 is the only patient respondent examined for mouth lesions or abnormalities while working at Independent Medical Services. Respondent does not recall if Patient 1 had any symptoms suggesting that she had lesions in her mouth.

66. Respondent denies touching his penis during the examination, or placing Patient 1's hand over his clothed penis. Respondent also denies asking Patient 1 to lift her skirt or saying that she had nice legs.

67. Respondent did not document having performed a plastic surgery consultation, or the result of his findings. Respondent states that he did not document his breast or mouth examination because he did not have the proper template/form in the room. He did not explain why he could not simply document it on the form he was using, or if necessary, obtain the proper form during or after the visit.

68. Respondent's denial of initiating sexual contact with Patient 1 by fondling her breasts, rubbing her tongue, kissing her on the mouth and placing her hand on his clothed erect penis was inconsistent with his statements to police officers on May 3, 2014, and with his failure to deny what had occurred during the two pretext calls. His denials were also inconsistent with some of the statements he made during his Board interview, and they lacked credibility when compared to the medical record and the compelling testimony of Patient 1.

69. Respondent recalls his examination of Patient 2. He denies telling her that she "looked good" or looking her up and down. He denies that he pressed his erect penis against her or that she told him to "go back." Respondent denies that he touched her breasts with the stethoscope. Following the examination, he heard a commotion and saw that she was upset, prompting him to find the manager to ask what the problem was. He claims that he opened the door where Patient 2 was sitting in by mistake, and stated "Sorry, wrong room." Respondent denies apologizing to her because of his conduct.

70. Respondent's denial of Patient 2's allegation that he twice pressed his erect penis against her body was inconsistent with Patient 2's sudden and emotional reaction following the visit. It is also inconsistent with his decision to enter the room where she was sitting alone and apologize. Respondent's testimony concerning his examination of Patient 2 was not credible.

71. Respondent considers it an outrage that he has to respond to the Board's accusation after he was found not guilty in his criminal trial. He states that Patient 1 took advantage of him and lied under oath. Respondent also claims that Patient 2 lied about him. He does not know why Patient 1 came up with a plan to falsely accuse him. He accuses Patient 2 of "looking for a jackpot." Respondent describes the conduct of the police officers as "shameful." Respondent considers that conduct of the Medical Board personnel at his Board interview to have been unfair.

Character Evidence

72. Polly Evans is a medical assistant at Concentra where she has worked for 17 years. Evans testified at hearing as a character witness for respondent. Evans worked with respondent at Concentra during the six months he was employed there. Evans considered respondent to be very professional and quiet. She feels that respondent was well-regarded by other staff. Evans confirms that there is a sign in the examination rooms offering a chaperone. If Evans feels that a patient is shy, she offers a chaperone.

Evans recalls Patient 2 causing a commotion at the front desk. She felt Patient 2 was behaving unprofessionally because there were patients in the waiting room. Evans wanted her to move out of the lobby and into an examination room to make her complaint. Evans recalls Patient 2 stating that respondent touched her, that he leaned against her with his private parts. Patient 2 was tearful and Evans tried to comfort her. Other than the complaint by Patient 2, she never heard a complaint against respondent. Evans would change her opinion about respondent if she learned that he had twice touched patients with his erect penis – but she does not believe he would do that.

73. Andrea Anderson, R.N., N.P., Ph.D., has worked at Concentra as a nurse practitioner for over four years. She testified at hearing as a character witness for respondent. She treats patients injured at work and performs pre-employment examinations. Anderson and respondent were colleagues while he worked at Concentra. They consulted with each other about patients and would see each other in the clinic. Anderson reports that using a chaperone at Concentra is optional.

Anderson considered respondent to be an exemplary physician, an excellent colleague and a kind and spiritual man. She has never heard about a patient complaining about him. She is aware of Patient 2's claim, but she has never seen him act in a way that suggested anything sexually provocative. Anderson's opinion of respondent would not change, even if she learned that he had engaged in sexual behavior with two patients.

74. Kevin Brockman worked at Independent Medical Services from July 2013 until April 2014. Respondent provided a declaration from Brockman dated March 2, 2015. Brockman reported that Patient 1 was interested in plastic surgery due to weight loss and was on the referral list. Brockman considered respondent to be courteous and professional; he heard no complaints about respondent from patients.

75. Navjot Kaur worked as a medical assistant at Independent Medical Services from July 2013 until October 2014. She signed a declaration dated May 7, 2015, in which she reported that she considered respondent to be extremely pleasant, professional and well-liked. Kaur never heard complaints about respondent and thought he was an excellent physician.

76. Paul Levine, M.D., is a research professor at the University of Nebraska Medical Center. He testified on behalf of respondent at his criminal trial on March 29, 2016. Dr. Levine met respondent in 2003 or 2004 when respondent was working on his Master of Public Health degree at George Washington University. Dr. Levine was a research professor at George Washington University Medical Center at the time and respondent was his student. Dr. Levine recruited respondent to work on his research projects. Dr. Levine supervised respondent's work over a six-year period; he had no complaints and received positive feedback about respondent's work. Dr. Levine has recommended respondent for many positions.

Dr. Levine testified at respondent's criminal trial. He stated that he would not believe an allegation that respondent had fondled a patient's breasts; if he saw an actual videotape of respondent acting inappropriately with a patient, he would be concerned, but he has faith in respondent and he would need to speak to respondent to find out the circumstances before he would change his opinion about him.

Dr. Levine did not testify at hearing, and respondent did not offer a letter or declaration from Dr. Levine signed after Patient 2 made her allegations.

LEGAL CONCLUSIONS

1. The purpose of an administrative proceeding concerning licensure is not to punish the respondent, but rather is "to protect the public from dishonest, immoral, disreputable or incompetent practitioners [citations omitted]." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The goal is the prevention of future harm and the improvement and rehabilitation of the licensee. It is far more desirable to impose discipline before a licensee harms any patient than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.) While the objective, wherever possible, is to take action that is calculated to aid in the rehabilitation of the licensee, protection of the public shall be paramount. (Bus. & Prof. Code, §§ 2001.1; 2229.)

2. The standard of proof regarding the charging allegations is "clear and convincing" and the burden of proof is on complainant. (*Ettinger v. Board of Medical Quality Assurance*, *supra*, 135 Cal.App.3d at 856; see also *Medical Board of California v. Superior Court (Liskey)* (2003) 111 Cal.App.4th 163, 170-171.) Thus, the burden rests on complainant to establish the charging allegations by proof that is clear, explicit and unequivocal – so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.) Complainant has met this burden.

Unprofessional Conduct

3. Business and Professions Code section 2234 authorizes the Board to impose discipline against any licensee who is charged with unprofessional conduct, including an act of gross negligence (subd. (b)).

4. The evidence established that respondent committed acts of unprofessional conduct during his examinations of Patient 1 and Patient 2. His misconduct constituted extreme departures from the standard of care and gross negligence. (Factual Findings 4 through 22, 25 through 32, 42 through 52, 68 and 70.) Cause for discipline exists pursuant to Business and Professions Code section 2234, subdivision (b).

Sexual Misconduct

5. Business and Professions Code section 726 provides that any act of sexual abuse, misconduct or relations with a patient constitutes unprofessional conduct and grounds for disciplinary action.

The evidence established that respondent committed sexual misconduct with Patient 1 and Patient 2. (Factual Findings 4 through 22, 25 through 32, 42 through 52, 68 and 70.) Cause for discipline exists pursuant to Business and Professions Code section 726.

Sexual Exploitation

6. Business and Professions Code section 729, subdivision (a), provides that any physician who engages in an act of sexual contact with a patient, absent an exception not applicable here, is guilty of sexual exploitation. Consent of the patient is not a defense.

The evidence established that respondent engaged in sexual contact with two patients. Cause for discipline exists pursuant to Business and Professions Code section 729, subdivision (a). (Factual Findings 4 through 22, 25 through 32, 42 through 52, 68 and 70.)

Disciplinary Considerations

7. Cause for discipline having been established, the issue is the appropriate measure of discipline. Business and Professions Code section 2229 specifies that, to the extent not inconsistent with public protection, disciplinary action shall be calculated to aid in the rehabilitation of licensees. To implement the mandates of section 2229, the Board has adopted the Manual of Model Disciplinary Orders and Disciplinary Guidelines (guidelines), 12th Edition.

The minimum recommended discipline for a violation of Business and Professions Code section 729 recommended by the guidelines is license revocation. In support, the guidelines cite to Business and Professions Code section 2246, which mandates license

revocation in cases of sexual exploitation involving two or more victims. Because this matter involves two victims, license revocation is mandatory under the statute.

Moreover, license revocation is the appropriate disciplinary penalty because respondent has denied his misconduct and has failed to take responsibility for it. A physician's personal qualifications necessarily include honesty, integrity, and judgment. The relationship between a physician and patient is grounded in the utmost trust and confidence in the physician's honesty and integrity. Respondent's misconduct toward Patient 1 and Patient 2 was highly inappropriate and manipulative. That he continues to deny his misconduct amounts to dishonesty. Intentional dishonesty demonstrates a lack of moral character and can indicate unfitness to practice medicine. (*Matanky v. Board of Med. Examiners* (1978) 79 Cal.App.3d 293, 305.) The seriousness of misconduct is balanced against the physician's showing of rehabilitation. The burden of establishing rehabilitation is on respondent and the standard of proof is a preponderance of the evidence. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164; Evid. Code, §§ 115, 500.) Respondent has failed to present any evidence of rehabilitation. Finally, it is notable that shortly after he was acquitted of criminal misconduct relating to Patient 1, respondent committed sexual misconduct against Patient 2. Revocation of respondent's license is necessary to protect the public.

ORDER

Physician's and Surgeon's Certificate No. A127064, issued to Muhannad S. Hafi, M.D., is revoked.

DATED: October 24, 2018

DocuSigned by:

Jill Schlichtmann

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JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

1 XAVIER BECERRA
Attorney General of California
2 JANE ZACK SIMON
Supervising Deputy Attorney General
3 JOSHUA M. TEMPLET
Deputy Attorney General
4 State Bar No. 267098
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-5529
6 Facsimile: (415) 703-5480
E-mail: Joshua.Templet@doj.ca.gov
7 Attorneys for Complainant

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO *November 21, 2017*
BY: *R. Voong* ANALYST

8 **BEFORE THE**
9 **MEDICAL BOARD OF CALIFORNIA**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 800-2015-011200

12 **Muhannad S. Hafi M.D.**
13 **19800 Valco Parkway**
14 **Unit 343**
15 **Cupertino, CA 95014-7107**

A C C U S A T I O N

16 **Physician's and Surgeon's Certificate**
17 **No. A127064,**

18 Respondent.

19 Complainant alleges:

20 **PARTIES**

21 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
22 capacity as the Executive Director of the Medical Board of California, Department of Consumer
23 Affairs (Board).

24 2. On August 23, 2013, the Medical Board issued Physician's and Surgeon's Certificate
25 Number A127064 to Muhannad S. Hafi M.D. (Respondent). The certificate was in full force and
26 effect at all times relevant to the charges brought herein and will expire on March 31, 2019,
27 unless renewed.

28 ///

JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Code section 2004 provides that the Board shall have the responsibility for the enforcement of the disciplinary and criminal provisions of the Medical Practice Act.

5. Code section 2227 of the Code authorizes the Board to take action against a licensee who has been found guilty under the Medical Practice Act by revoking his or her license, suspending the license for a period not to exceed one year, placing the license on probation and requiring payment of costs of probation monitoring, or taking such other action as the Board deems proper.

6. Code section 2234 states:

The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

(b) Gross negligence.

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

....

7. Code section 726, subdivision (a), states:

The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division or under any initiative act referred to in this division.

8. Code section 729 states:

(a) Any physician and surgeon, psychotherapist, alcohol and drug abuse counselor or any person holding himself or herself out to be a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor, who engages in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a patient or client, or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, unless the physician and surgeon, psychotherapist, or alcohol and drug abuse counselor has referred the patient or client to an independent and objective physician and surgeon, psychotherapist, or alcohol and drug abuse counselor recommended by a third-party physician and surgeon, psychotherapist, or alcohol and drug abuse counselor for treatment, is guilty of sexual exploitation by a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor.

(b) Sexual exploitation by a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor is a public offense:

(1) An act in violation of subdivision (a) shall be punishable by imprisonment in a county jail for a period of not more than six months, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

(2) Multiple acts in violation of subdivision (a) with a single victim, when the offender has no prior conviction for sexual exploitation, shall be punishable by imprisonment in a county jail for a period of not more than six months, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

(3) An act or acts in violation of subdivision (a) with two or more victims shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars (\$10,000); or the act or acts shall be punishable by imprisonment in a county jail for a period of not more than one year, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

....

For purposes of subdivision (a), in no instance shall consent of the patient or client be a defense. However, physicians and surgeons shall not be guilty of sexual exploitation for touching any intimate part of a patient or client unless the touching is outside the scope of medical examination and treatment, or the touching is done for sexual gratification.

(c) For purposes of this section:

....

(3) "Sexual contact" means sexual intercourse or the touching of an intimate part of a patient for the purpose of sexual arousal, gratification, or abuse.

(4) "Intimate part" and "touching" have the same meanings as defined in Section 243.4 of the Penal Code.

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1 9. Code section 2246 states:

2 Any proposed decision or decision issued under this article that contains any finding
3 of fact that the licensee engaged in any act of sexual exploitation, as described in
4 paragraphs (3) to (5), inclusive, of subdivision (b) of Section 729, with a patient shall
5 contain an order of revocation. The revocation shall not be stayed by the
6 administrative law judge.

7 10. Code section 2266 states:

8 The failure of a physician and surgeon to maintain adequate and accurate records
9 relating to the provision of services to their patients constitutes unprofessional
10 conduct.

11 11. Penal Code section 243.4, subdivision (e), states that "touches" means "physical
12 contact with another person, whether accomplished directly, through the clothing of the person
13 committing the offense, or through the clothing of the victim."

14 12. Penal Code section 243.4, subdivision (g) states that "intimate part" means "the
15 sexual organ, anus, groin, or buttocks of any person, and the breast of a female."

16 Patient P-1

17 13. In 2012, patient P-1¹ underwent laparoscopic gastric banding surgery to help with
18 weight loss. A Lap-Band adjustable gastric banding system was implanted to restrict food intake
19 by allowing the effective size of her stomach to be adjusted. The Lap-Band requires regular
20 physician visits, approximately every month, for such adjustments to ensure proper quantity of
21 food intake.

22 14. Respondent was one of several physicians who worked at the medical office where P-
23 1 had her Lap-Band adjusted each month. In early 2014, the Respondent began handling P-1's
24 monthly Lap-Band adjustments.

25 15. P-1 returned to the Respondent's office on April 19, 2014 for her monthly Lap-Band
26 adjustment. The Respondent examined P-1 alone in an examining room, with no assistant present.

27 16. The Respondent suggested to P-1 that she consider plastic surgery to remove loose
28 skin resulting from her post-surgery weight loss. The Respondent then looked at her legs and told
her that she had nice legs.

¹ Patient names are abbreviated to protect patient privacy. The Respondent will have the
opportunity to identify the patient and to obtain the records of the investigation during discovery.

17. The Respondent then asked P-1 to lift up her shirt. P-1 did so and unlatched her bra, exposing her breasts. The Respondent cupped her breasts with both of his hands and lifted them up. The Respondent then began to fondle her breasts. P-1 believed that the Respondent may have been performing a breast exam or an evaluation for plastic surgery. She had never experienced either before.

18. The Respondent told P-1 to lie down on the examination table. She laid on her back. The Respondent continued to fondle her bare breasts and to push them together.

19. The Respondent leaned down toward P-1 and kissed her on the lips.

20. The Respondent then put his ungloved finger in her mouth and rubbed her tongue.

21. The Respondent then grabbed the patient's hand and placed it on his clothed, erect penis. The Respondent moved her hand in a circular motion, rubbing it over his penis.

22. The Respondent then asked P-1 if she was OK before proceeding to adjust her Lap-Band. At the end of the appointment, the Respondent said, "Well, this was nice."

FIRST CAUSE FOR DISCIPLINE

(Sexual Misconduct and Exploitation: Patient P-1)

23. The Respondent's touching and fondling of his patient's breasts was not performed for a legitimate medical purpose but rather for the Respondent's sexual arousal and gratification. The Respondent's conduct constitutes unprofessional conduct; an extreme departure from the standard of care and gross negligence, in violation of Code section 2234(b); sexual misconduct, in violation of section 726; and sexual exploitation, in violation of section 729.

24. The Respondent's kissing of his patient on her lips constitutes unprofessional conduct; an extreme departure from the standard of care and gross negligence, in violation of Code section 2234(b) (gross negligence); and sexual misconduct, in violation of section 726.

25. The Respondent's putting his ungloved finger in his patient's mouth constitutes unprofessional conduct; a departure from the standard of care and negligence, in violation of section 2234(c); and sexual misconduct, in violation of section 726.

26. The Respondent's placement of his patient's hand on his clothed, erect penis and his movement of her hand over his penis was not performed for a legitimate medical purpose but

1 rather for the Respondent's sexual arousal and gratification. The Respondent's conduct
2 constitutes unprofessional conduct; an extreme departure from the standard of care and gross
3 negligence, in violation of Code section 2234(b); sexual misconduct, in violation of section 726;
4 and sexual exploitation, in violation of section 729.

5 27. The Respondent's failure to document his alleged examination of his patient's breasts
6 and mouth constitutes unprofessional conduct; a departure from the standard of care and
7 negligence, in violation of Code section 2234(c); and inadequate recordkeeping, in violation of
8 section 2266.

9 Patient P-2

10 28. Patient P-2 was referred to a medical clinic by her prospective employer for a pre-
11 employment medical examination. On August 18, 2016, P-2 reported to the clinic for her
12 examination appointment. The Respondent conducted the examination.

13 29. After entering the examination room, the Respondent told P-2 that she "looked good."
14 The Respondent approached P-2, who was sitting on the examination table, and stood very close
15 to her. The Respondent then moved even closer to P-2 and pressed his erect penis into P-2's leg.
16 P-2 pushed the Respondent away and told him to get back.

17 30. Later in the examination, the Respondent again stood very close to P-2 and pressed
18 his erect penis into P-2's leg. P-2 pulled away from the Respondent.

19 31. After the Respondent completed his examination, P-2 went to the front desk and
20 began to cry as she told the clinic's staff what the Respondent had done to her. A staff person
21 took P-2 to an office room and arranged for the clinic's operations director to meet with her there.

22 32. While P-2 was waiting alone in the office room, the Respondent entered the room and
23 told P-2, "I'm sorry."

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